Supreme Court, U.S.
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No. 85-1216

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

JOHN D. O'CONNELL,
Petitioner,
v.
MARYLAND STEEL ERECTORS, INC.
and
STEELE & MORONEY, INC.,
Respondents.

On Petition for a Writ of Certiorari to the District of Columbia Court of Appeals

BRIEF IN OPPOSITION OF RESPONDENT STEELE & MORONEY, INC.

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STATEMENT REQUIRED BY RULE 28.1

Respondent Steele & Moroney, Inc. is a closely-held corporation that has no parent or subsidiary corporations, nor any corporate affiliates.

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BRIEF IN OPPOSITION OF RESPONDENT STEELE & MORONEY, INC.

RELEVANT STATUTES

In addition to the statutes reproduced in the petition (Pet. at 2-4), the following statutory provisions are relevant:

Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 933(b) (1982):

> Acceptance of such compensation under an award in a compensation order filed by the deputy commissioner or Board shall operate as an assignment to the employer of all right of the person entitled to

compensation to recover damages against such third person unless such person shall commence an action against such third person within six months after such award.

District of Columbia Workers' Compensation Act of 1979, § 46 (published at 27 D.C. Register 2541 (1980)):

An act to provide compensation for disability or death resulting from injury to employees in certain employments in the District of Columbia and for other purposes, approved May 18, 1928 (45 Stat. 600; D.C. Code sec. 36-501-503) is hereby repealed.

STATEMENT OF THE CASE

Petitioner in this case seeks review of a unanimous decision of the District of Columbia Court of Appeals. That decision addressed a single narrow question: under the local District of Columbia workers' compensation statute, when may an injured non-maritime employee who has received a compensation award bring a third-party tort action for those same injuries? To answer that question, the Court of Appeals was required by the local compensation statute (the District of Columbia Workmen's Compensation Act of 1928 (the "1928 Act"))[1] to refer to the pertinent provisions of the national Longshoremen's and Harbor Workers' Compensation Act (the "LHWCA").[2] (Section 36-501 of the local 1928 Act, now repealed, expressly provided that the provisions of the national LHWCA would be applicable to the District.)

Accordingly, applying the plain language of Section 33(b) of the LHWCA,[3] as construed by this Court in *Rodriguez* v. *Compass Shipping Co.*, 451 U.S. 596 (1981), the Court of Appeals held that an injured worker must

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[1] D.C. Code §§ 36-501 to -503 (1973) (repealed 1982).

[2] 33 U.S.C. §§ 901 *et seq.* (1982).

[3] 33 U.S.C. § 933(b) (1982) (reprinted at pages 1-2, *supra*).

bring any third-party tort action within six months of the date of any compensation award. (After six months, the right of action is assigned to the worker's employer.) Inasmuch as petitioner did not bring his current tort action within the applicable six-month period, the Court of Appeals determined that the action did not lie.

In reaching this determination, the Court specifically rejected petitioner's contention that Congress' 1984 amendment to Section 33 of the LHWCA conferred a right to bring this tort action even after expiration of the statutory six-month period.[4] As the Court noted, in 1979 the City Council of the District of Columbia enacted a new workers' compensation law for the District ("the New D.C. Act")[5] and in § 46 of that Act (reprinted at page 2, *supra*) the Council repealed the 1928 Act. As a result of this repeal, the Court found, "the Council divorced the local workers' compensation system entirely from the Longshore Act . . . ." Pet. App. at 15a. Therefore, according to the Court, "as the 1928 Act was no longer on the books, what Congress subsequently did to the Longshore statute [in the 1984 LHWCA Amendments] did not affect any rights" of petitioner. *Id.* at 17a. Furthermore, the Court held, while Congress could have overturned the repeal of the 1928 Act and directly legislated for the District of Columbia through the 1984 LHWCA Amendments, nothing in the language or legislative history of those amendments indicates that Congress intended to do so.[6]

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[4] Section 21(a) of the 1984 LHWCA Amendments revised Section 33(b) such that although an injured employee's right to sue is still assigned to his employer six months after the employee receives a compensation award, if the *employer* does not bring suit within 90 days, the right of action reverts back to the employee for the remainder of the limitations period. Pet. at 3; *see* 33 U.S.C.A. § 933(b) (1986).

[5] D.C. Code §§ 36-301 *et seq.* (1981).

[6] The City Council repealed the 1928 Act pursuant to authority granted it by Congress through the Home Rule Act. *See* D.C. Code

The Court therefore concluded that under the applicable provision of the local compensation law (*i.e.*, Section 33(b) of the LHWCA as applied to the District under the 1928 Act), petitioner's right to bring a tort action had been assigned to his employer and his current action was therefore properly dismissed. Petitioner's request for rehearing or a rehearing *en banc* was denied on October 21, 1985, and his petition for a writ of certiorari was filed on January 17, 1986).

SUMMARY OF ARGUMENT

The Court should deny the present petition for three reasons. First, this case concerns issues of local law that apply exclusively to the District of Columbia. No sound reason exists for this Court to depart from its well-established practice of deferring to the District of Columbia Court of Appeals' resolution of such local matters. Second, the substance of those local matters does not in any case merit this Court's review: the matters are not of great importance, will have little or no application other than to a limited number of cases in the District of Columbia, and have been resolved in the same way by every court that has considered them. Finally, the Court of Appeals' decision is in any event clearly correct and is firmly supported by the language, legislative histories, and purposes of the applicable statutes. The petition should therefore be denied.

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§ 1-227 (1981). Congress approved the City Council's new worker-compensation legislation by failing to veto that legislation during the 30-day period provided for under the Home Rule Act. *See* D.C. Code § 1-233(c)(1). The City Council's authority to adopt new worker compensation legislation for the District—including the repeal of the 1928 Act—was specifically upheld in *District of Columbia* v. *Greater Washington Cent. Labor Council*, 442 A.2d 110 (D.C. 1982), *cert. denied*, 460 U.S. 1016 (1983).

REASONS FOR DENYING THE WRIT

1. The Court Should Defer To the Court of Appeals' Decision In This Local Law Case.

Assuming that this Court has jurisdiction to review the decision below,[7] the Court should not agree to do so. This Court has repeatedly enunciated its strong policy of deferring to decisions by the District of Columbia Court of Appeals concerning local issues of law. This is plainly a case where such deference is appropriate.

Non-maritime employees in the District (such as petitioner) who sustained injuries prior to July 26, 1982 derived their worker-compensation rights from the local 1928 Act, not from the LHWCA.[8] This is so even though the 1928 Act incorporated the LHWCA's substantive provisions; the 1928 Act is nevertheless a "comprehensive legislative scheme" that is entirely distinct from the national LHWCA[9] and is "a local law . . . rather than a

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[7] As the jurisdictional basis for his petition, petitioner relies on 28 U.S.C. § 1257(3). That Section provides for review by this Court of state court judgments "[b]y writ of certiorari, where the validity of a . . . statute of the United States is drawn in question . . ." (Pet. at 4). Yet the Court of Appeals did not question the *validity* of *any* statute. Rather, the Court simply held that amendments to a national statute (the LHWCA) had no impact on cases arising under a separate, local act (the 1928 Act). *All* of the statutes relevant to the case—whether federal or local—remain *fully valid* under the Court of Appeals' decision. Inasmuch as the Court's jurisdiction under Section 1257(3) is therefore doubtful at best, the petition may be properly denied on that ground alone.

[8] It is settled that claims arising prior to the effective repeal of the 1928 Act (July 26, 1982) are governed by that Act, while subsequent claims are governed by the New D.C. Act. *E.g., Garrett* v. *Washington Air Compressor Co.*, 466 A.2d 462, 462 n.1 (D.C. 1983); *Carey* v. *Crane Service Co.*, 457 A.2d 1102, 1103 n.2 (D.C. 1983). *Accord, e.g., Randall* v. *Comfort Control, Inc.*, 725 F.2d 791, 792 n.1 (D.C. Cir. 1984).

[9] *Harrington* v. *Moss*, 407 A.2d 658, 660 (D.C. 1979); *Gudmundson* v. *Cardillo*, 126 F.2d 521, 525 (D.C. Cir. 1942). *Accord Cardillo*

federal law . . . [that] always has been regarded by the courts as a 'local act' and construed as a state law." [10]

The issue of petitioner's ability to bring this third-party action more than six months after his receipt of a compensation award under the 1928 Act is therefore plainly a local law question, affecting only non-maritime employee cases arising in the District. Likewise, the intent of the City Council in repealing the 1928 Act, including the question whether that repeal was intended to preclude application of future LHWCA amendments to the District, is also a local issue. Finally, the question whether Congress nevertheless intended the 1984 LHWCA Amendments to affect the ability of workers covered by the 1928 Act to commence tort actions more than six months after receipt of a compensation award raises only issues of local application.[11]

Thus, the question raised by the petition—whether the City Council or Congress intended the 1984 LHWCA Amendments to apply to this case—turns exclusively on matters *uniquely affecting the District of Columbia.* This Court could decide that question only by resolving certain peculiarly local issues, *i.e.*, (1) the intent of the City Council in repealing the local 1928 Act and (2) whether Congress intended to override that repeal in the 1984 LHWCA Amendments and again act as local legislator for the District. No sound reason has been advanced for this Court to undertake review of such issues; the Court should therefore follow its well-established policy of de-

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v. *Liberty Mutual Ins. Co.*, 330 U.S. 469, 470-71, 477 (1947) (construing case as one governed by the 1928 Act).

[10] *District of Columbia* v. *Greater Washington Cent. Labor Council, supra,* 442 A.2d at 116.

[11] It is well-settled that the construction of Congressional action as it peculiarly affects the District of Columbia raises local questions most appropriately resolved by the local D.C. courts. *See Pernell* v. *Southall Realty,* 416 U.S. 363, 366-69 (1974); *Busby* v. *Electric Util. Employees Union,* 323 U.S. 72, 74-75 (1944).

ferring to the Court of Appeals "on matters of exclusively local concern" [12] and deny the petition.[13]

2. The Questions Raised by This Case Do Not Merit Review by This Court.

Even if this Court were not inclined to deny review in deference to the Court of Appeals, it is clear that this case does not present issues that merit this Court's attention. The case does not involve a decision that is (1) at variance with other court decisions or (2) that raises an

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[12] *Whalen* v. *United States*, 445 U.S. 684, 687 (1980). *Accord United States* v. *Frady*, 456 U.S. 152, 159 (1982); *Pernell* v. *Southall Realty*, 416 U.S. 363, 366, 369 (1974) (deference is owed to local District of Columbia courts "save in exceptional situations where egregious error has been committed"; review should be denied "absent a constitutional claim or a problem of general federal law of nationwide application").

[13] Because the Court of Appeals ruled that the 1984 LHWCA Amendments are inapplicable in 1928 Act cases, it expressly and properly declined to reach the other question raised in the petition: whether the "relation back" doctrine (developed principally under Fed. R. Civ. P. 15(c)) should be invoked, evidently by analogy, to allow petitioner's otherwise-untimely action to proceed. Pet. App. at 13a. This second question *assumes* that the 1984 LHWCA Amendments *do apply* to this case; it would therefore be reached *only* if the Court were to conclude that the Court of Appeals was incorrect in holding the 1984 Amendments inapplicable to the District of Columbia. Contrary to petitioner's suggestion, therefore, his "relation back" question is *not* an *independent* basis for reviewing the decision below on certiorari.

Furthermore, even if the 1984 LHWCA Amendments were thought applicable to the District, petitioner's "relation back" question would still not be presented by this case. By their own terms, the 1984 Amendments expressly apply to "claims pending" on the date of their enactment. Pet. App. at 3. Thus, the question whether this case could ever be subject to the 1984 Amendments turns on the Amendments' "claims pending" language, not the "relation back" rule. The meaning of "claims pending" has neither been briefed by the parties in this case, nor addressed by the courts below.

important national issue. As such, under this Court's criteria the case is not worthy of review on certiorari,[14] regardless whether it is deemed local or federal in nature.

First, the Court of Appeals' decision not only does not conflict with other decisions, it is in *full agreement* with *every one* of the numerous courts that have addressed the issue of the applicability of the 1984 Amendments to 1928 Act cases.[15]

Second, the case plainly does not present an important question of federal law. As we have noted, the issues raised here concern only *local* workers' compensation law in the District of Columbia. The class of employees affected by the Court of Appeals' decision is narrow and finite, *i.e.*, non-maritime employees in the District who sustained injuries prior to July 26, 1982. District employees injured after that date are governed by a dif-

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[14] Such review is appropriate (1) where a state court of last resort has decided a case in a way that is in conflict with decisions of other state courts or federal appeals courts, or with this Court's own applicable decisions, or (2) where the case presents important issues of federal law. *See generally* Supreme Court Rule 17.

[15] The Court of Appeals cited three federal district court decisions which agreed with its analysis: *In re Metro Subway Accident Referral*, Misc. No. 82-306 (D.D.C. Dec. 18, 1984), *appeal filed*, No. 85-5029 and consolidated cases (D.C. Cir.); *Stokes* v. *George Hyman Constr. Co.*, C.A. No. 84-1418 (D.D.C. Jan. 18, 1985), *appeal filed*, No. 85-5147 (D.C. Cir.); and *Lehew* v. *AFGO Eng'g Corp.*, C.A. No. 81-1593 (D.D.C. Feb. 27, 1985), *appeal filed*, No. 85-5304 (D.C. Cir.). For other decisions in full agreement with the Court of Appeals' holding, *see Holmes* v. *Leon N. Weiner & Assoc., Inc.*, 603 F. Supp. 122, 124 n.4 (D.D.C. 1985); *Estep* v. *Construction Gen., Inc.*, C.A. No. 126-81 (D.C. Sup. Ct. Apr. 3, 1985); *Montag* v. *Fischbach & Moore Corp.*, C.A. No. 4643-83 (D.C. Sup. Ct. Feb. 13, 1985); *Hatter* v. *George A. Fuller Co.*, C.A. No. 9089-80 (D.C. Sup. Ct. Dec. 21, 1984); *Pryor* v. *James McHugh Constr. Co.*, Case Nos. 85-LHC-114 (Dep't of Labor, Aug. 20, 1985); and *McNeill* v. *WMATA*, Case Nos. 84-DCWC-51, 522 (Dep't of Labor, Feb. 22, 1985).

ferent local statute (the New D.C. Act) and so are unaffected by this case. Moreover, because the case does not involve construction of *any* of the LHWCA's *substantive* provisions, maritime workers covered by the national LHWCA are completely unaffected by the decision. The case, therefore, concerns nothing more than routine application of a local statute plainly requiring that tort actions be brought by an employee within six months of a compensation award, and thereafter be brought by his employer.

As a narrow decision by the highest local court on a local worker-compensation issue—a decision that is in full accord with all other relevant decisions—the case clearly does not merit review on certiorari.

3. The Court of Appeals Correctly Interpreted the Applicable Statutes.

Finally, the Court of Appeals' decision is a correct one that is firmly grounded in the plain terms and the legislative histories of the relevant statutes. Respondent Maryland Steel Erectors has presented the Court with a thorough analysis of the Court of Appeals' opinion that plainly demonstrates that the decision is well-reasoned. *See* Opposition to the Petition for Writ of Certiorari to the District of Columbia Court of Appeals of Respondent Maryland Steel Erectors, Inc. at 7-11. That analysis, adopted herein by reference, presents a third, independent reason why the petition should be denied.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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Dated: February 18, 1986

CERTIFICATE OF SERVICE

I, Gary W. Brown, a member of the Bar of this Court, hereby certify that three (3) copies of the "Brief in Opposition of Respondent Steele and Moroney, Inc." were mailed, first-class postage prepaid, this 18th day of February, 1986, to:

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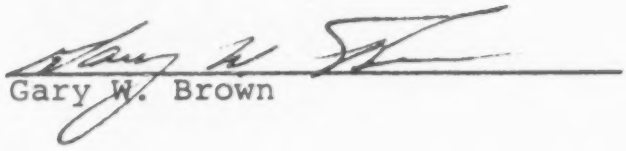

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